

NO. 22671

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. McDONOUGH, et al.,
Appellants,

-vs-

SNELLING & SNELLING, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

FILED

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11 Appellee.

12 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14

15 _____
16 BRIEF FOR APPELLANTS
17 _____

18 This is an interlocutory appeal pursuant to the
19 provisions of 28 USC Section 1292 (a)(1) from an order
20 entered on October 5, 1967, granting a preliminary injunc-
21 tion (95)¹ and the preliminary injunction itself entered
22 on November 21, 1967. (See appellants' Motion to Correct
23 Record regarding omission of preliminary injunction from

24 * 1

25 The bare number indicates a reference to the Record
26 on Appeal. A number preceded by the letter "R"
designates a reference to the Reporter's Transcript
of oral proceedings.

1 the record). The underlying action was brought by Snelling
2 & Snelling, Inc., a Pennsylvania corporation, against
3 appellants, and other defendants, all citizens and resi-
4 dents of the State of California, for permanent injunc-
5 tions restraining all defendants from engaging in the
6 employment agency business, for a declaration of the rights
7 of the parties under certain terminated licensing agree-
8 ments, and for damages in excess of \$10,000.00 (12a-1)
9 The District Court's jurisdiction was therefore invoked
10 under 28 USC Section 1332 (a)(1). Appellants, on October
11 25, 1967, filed a Notice of Appeal (97) and on December
12 6, 1967, filed a timely Amended Notice of Appeal (138).
13 This Court's jurisdiction accordingly rests upon 28 USC
14 Section 1292 (a)(1).

15 STATEMENT OF THE CASE

16 This is a trade secret case in which there is little
17 evidentiary conflict. Primarily, the appeal proceeds on the
18 question of whether the District Court correctly deter-
19 mined and applied California's public policy on covenants
20 restraining competition; and secondarily, on whether
21 findings of trade secrets and irreparable injury are sup-
22 ported by the evidence.

23 Appellee is a Pennsylvania corporation engaged in
24 licensing and franchising employment agencies (16).

25 Appellants paid appellee \$8,400.00 for a license and
26 franchise to operate an employment agency business in the

1 City of Riverside, California, and entered into a written
2 license and franchise agreement on February 1, 1965 (20-
3 25). Appellants rescinded the license for fraud, deceit,
4 and failure of consideration on May 19, 1967 (56-58).
5 Appellee terminated the license on July 21, 1967, for
6 appellants' failure to pay overrides (27-29).

7 As stated, the main action seeks, among other things,
8 a permanent injunction against appellants and other
9 California licensees holding similar agreements, enjoining
10 and restraining them from operating their employment agency
11 offices in competition with appellee in areas and for
12 time periods stated in the agreements.

13 The matter now before this Court, however, arose out
14 of appellee's request for a preliminary injunction re-
15 straining appellants McDonough (of the several defendants
16 in the main action) from opening an employment agency
17 office in the City of San Bernardino, California, or within
18 35 miles of any other employment agency holding a license
19 and franchise from appellee. (14-15)

20 The application for the preliminary injunction was
21 based upon three considerations:

22 1. That the license and franchise agreement contained,
23 in paragraph 8(b) thereof, a restrictive covenant prohibi-
24 ting appellants from competing with appellee within stated
25 time and area limitations after termination of the agree-
26 ment. (21-22, 38, 40-42)

1 2. That appellee furnished trade secrets to appel-
2 lants and that it was entitled to restrain them from utili-
3 zing the secrets in their San Bernardino office. (38-39)
4 Appellee relied upon paragraphs 2(a), 8(a) and 8(b) of the
5 agreement wherein appellants purported to acknowledge that
6 the methods, procedures, and techniques of appellee con-
7 stituted valuable confidential information which they
8 could not disclose or use after termination of the agree-
9 ment. (36); the contents of its training manuals (appellee's
10 Exhibit "I" received in evidence at R 11); and the testimony
11 of its Sacramento, California, franchisee, Damon Wheeler,
12 received over appellants' objection, that the trade secrets
13 of appellee consisted of "the scope of the concept covered
14 in the manual, which covers all phases of the business,
15 both from a counselor and managerial point of view", and
16 the "total approach, the philosophy is different" in that
17 Snelling preaches "we place people; we don't fill job
18 openings", and that the usual non-Snelling agency that
19 he was familiar with merely filled job orders. Wheeler
20 further stated that the main theme that he saw through
21 the Snelling approach was that "whoever comes into our
22 office is placeable somewhere, and that we engage in finding
23 those people employment opportunity." (R 95-96)

24 3. That the Snelling & Snelling name had value as
25 a trade name and that appellants' use of the name "S & S
26 Agency" was an obvious derivation of the Snelling & Snelling

1 name and its use in San Bernardino constituted an infringe-
2 ment thereon. (39-40) Appellee relied upon the contrac-
3 tual provisions aforesaid and submitted an affidavit
4 from Max Van Tilburg, (the Snelling San Bernardino fran-
5 chisee) stating that he had received one telephone call
6 from a party who inquired whether another Snelling employ-
7 ment agency was opening up in the City of San Bernardino.
8 (94)

9 4. To support the element of threatened irreparable
10 injury in connection with its request for the preliminary
11 injunction, appellee brought in the evidence of John
12 McBrearty, its Vice President, who testified, over objection
13 by appellants, that many of its franchised offices were
14 looking at the developments in appellee's application for
15 a preliminary injunction against appellants and that "if
16 Mr. McDonough is allowed to leave the system" he believed
17 that 50 franchisees would attempt to do the same thing at
18 an annual financial loss to appellee of more than
19 \$550,000.00 (R 176/8-177/17).

20 Appellants resisted the application for the preliminary
21 injunction and obtained an order permitting continued
22 operation of the business (46) during the protracted
23 hearing of the Order to Show Cause. Appellants grounded
24 their opposition to the various considerations advanced by
25 appellee upon the following facts and legal principals:

26 1. The Restrictive Covenant

1 Appellants' opposition here was based purely upon
2 legal principles. They were:

3 a. The covenant in restraint of competition
4 and trade is repugnant to California's strong and settled
5 policy as expressed in Section 16600 of the Business and
6 Professions Code, and is for that reason void and unenforce-
7 able.

8 b. The provision in the license agreement,
9 paragraph 17, that Pennsylvania law shall govern the inter-
10 pretation thereof (23) does not override the dominant con-
11 sideration that California's public policy must be given
12 controlling effect.

13 c. In diversity cases, it is settled that federal
14 courts sitting in California must apply California's
15 principles of substantive law, including its rules on
16 choice of law. (These contentions of appellants were
17 presented to the Court at pages 1-7 of their Memorandum of
18 Points and Authorities in Opposition to Preliminary Injunc-
19 tion filed on September 27, 1967. By accident and mistake,
20 these points and authorities were not included in the
21 Designation of Record on Appeal and counsel for appellants
22 have moved this Court for an order correcting that omission;
23 assuming the motion is granted, a record reference to the
24 fact that these principles of law were presented to the
25 trial court will then be supplied. The matters were also
26 brought to the District Court's attention in appellants'

1 Motion to Amend and Supplement Findings of Fact and Con-
2 clusions of Law (114-116).)

3 2. Trade Secrets

4 Appellants contended that to be protectable by
5 injunction the information or processes must be actually
6 secret and confidential; that contracting parties can not
7 make secret by agreement information or processes which
8 are not in fact secret; and that matters of public knowledge
9 or of general knowledge in an industry can not be appro-
10 priated by one as his secret. Appellants' evidence showed:
11 (a) there were many other employment agency manuals avail-
12 able in the employment agency industry, prepared, published,
13 and distributed by persons other than Snelling that contain-
14 ed the substance and essence of the methods and techniques
15 extolled and sold by appellee (Defendants' Exhibit "B"
16 of October 31, 1967; R 148/16-23); (b) a personnel agency
17 manager with sixteen years experience in the industry in
18 Southern California, twelve of them in a management capacity,
19 (R 72-73) stated there was nothing of unique value among
20 the practices, procedures and policies advocated by
21 appellee and outlined in its manuals (R 75-76); (c) appel-
22 lant Robert McDonough's extensive contacts with other
23 employment agency operators not connected with the Snelling
24 system disclosed that they all operated in substantially
25 the same manner and utilized the same methods and techni-
26 ques as Snelling (R 31-33; 149); (d) that contrary to Mr.

1 Wheeler's testimony describing the central theme of the
2 Snelling methods, its manual recommended doing little or
3 no work on 40-60 percent of the applicants that come in
4 (R 121/12-122/11); (e) the mass exodus of employment coun-
5 selors from Snelling franchised agencies, in California and
6 elsewhere, all of whom were well versed and schooled in
7 the Snelling method (R 51/5-52/14; 33/4-35/1; 104/6-105/24)
8 at a rate of approximately 50 per year each for McDonough
9 and Wheeler - and at a rate over the country of 700 to 1000
10 per year in the total Snelling system (R 224/1-22); (f)
11 appellee's failure to police its alleged trade secrets in
12 the case of (1) its own former national supervisors who
13 became familiar with the Snelling method while working in
14 its national headquarters and then entered the industry as
15 agency owners or franchisors, such as Moore, Crawford,
16 Applegate (R 205-210) and Goldberg, alias Davis (R 225-228)
17 one of whom sold and distributed his own employment agency
18 manual nationwide (R 156-160; 226) and (2) its former fran-
19 chisees that received the Snelling training and learned
20 the Snelling system and then left the organization - esti-
21 mated to number 225 out of 500 franchises sold (R 225-226),
22 including James Lapp (R 210-211) Edgar Kopp (R 212-214),
23 Wally Sayer (R 214), William McNamara (R 214-215), John Ray
24 Manning (R 215), Les Aarons (R 218-219, and Vern Alexander
25 (R 219-221) - at least one of whom (Lapp R 210-211) was
26 also a franchisor. To halt this mass dissemination of

1 its trade secrets, appellee brought but four to six law
2 suits designed to discourage this activity which only
3 applied to six of the former franchisees and employers
4 of appellee (R 221/11-223/25).

5 Appellants further showed that certain techniques
6 prescribed in appellee's manual were in direct conflict
7 with the regulations of the State of California con-
8 cerning operation of licensed employment agencies and that
9 pursuit of such procedures by appellants and other fran-
10 chisees in California enmeshed them in disciplinary proce-
11 edings with the State (McDonough R 63/25-66/9; Wheeler
12 108/18-113/7).

13 3. Infringement of Name.

14 Appellants proved that the employment agency reg-
15 ulations promulgated by the California State Labor Com-
16 missioner precluded and prohibited the use of the Snelling
17 & Snelling designation as a part of the licensed employ-
18 ment agency name of the various franchisees of appellee,
19 and that all advertising done by licensed employment
20 agencies in the State of California, including telephone
21 directory listings, had to be in the licensed name of the
22 agency (R 31; 37-38; 258/260); that this ruling was brought
23 to the attention of appellee's representatives by written
24 notice from the State Labor Commissioner in approximately
25 September of 1964 - prior to the date of the license and
26 franchise agreement between appellee and appellants (R 260/

1 19-24); and that the State had great difficulty in securing
2 compliance from the Snelling franchisees in California
3 with the name and advertising restrictions aforesaid and
4 that it was obvious to the State Labor Commissioner's
5 office that appellee had not informed their franchisees
6 about this limitation on the use of its name in California.
7 (R 260/19-264/2); That appellee continued its disregard of
8 the regulations and control exercised by the California
9 State Labor Commissioner in this respect, even up to the
10 time of hearing the application for preliminary injunction,
11 was evidenced by the advertisement in TV Guide in October
12 1967, (Defendants' Exhibit "C") which was clearly in viola-
13 tion of the State regulations (R 264/19-266/14); that
14 Robert Snelling, President of appellee corporation, was
15 aware of some of the difficulties concerning the use of
16 the Snelling & Snelling name in California as early as
17 December 1961 or January 1962 (R 69/9-71/18); that appellant
18 Robert McDonough had not been informed of any such dif-
19 ficulties during his training session at appellee's head-
20 quarters (R 58/6-13); and that he encountered the problem
21 for the first time when he applied for his license in
22 California (R 19/2-20/2); that employers in the Riverside
23 and San Bernardino area were not familiar with the Snelling
24 & Snelling name and it was of little value to appellants
25 (R 35/1-37/1; and that appellants then promoted and adver-
26 tised their own S & S Agency name rather than the

1 Snelling name (Defendants' Exhibit "A" of September 28,
2 1967. (R 35/7-37/1) None of this evidence was contradicted
3 in the slightest particular.

4 4. Irreparable Injury

5 Appellants showed that in expressing his
6 opinion on the subject of the threatened injury to Snelling,
7 McBrearty was in a state of confusion as to whether it was
8 the opening of the office in San Bernardino by appellants
9 McDonough or their success in ultimately being able to
10 leave the system and continue operating which would produce
11 the horrendous financial loss to appellee that he was
12 forecasting (contrast R 181/5-13 with R 181/19-184/2).
13 Appellee had received no telephone calls or letters,
14 demands or suits, from either a franchisee or an attorney
15 for a franchisee making any such threat; and that the only
16 actual threat of any such injury to appellee's system was
17 made by one individual at a Franchise Owners Association
18 meeting (an association strongly opposed by the Snelling
19 organization - R 238/20-239/14; 242/23-243/5; Defendants'
20 Exhibit "Y") to the effect that he and presumably 49 other
21 franchisees would follow McDonough's lead if he were
22 successful. This communication was made to someone other
23 than the witness and repeated as hearsay to him (R 250/13-
24 252/23). There had been continuing problems between
25 appellee's franchise system and these 50 dissident fran-
26 chisees over a period of some years (R 252/24-253/19)

1 although none of said other franchisees had ever sug-
2 gested anything to the witness personally which would
3 verify or confirm the hearsay report upon which his opinion
4 was based (R 253/20-254/10). The District Court rejected
5 offered evidence tending to establish that causes other
6 than the act of appellants sought to be enjoined were
7 the only possible efficient producing causes of the injury
8 appellee predicted to its system (R 240/7-243/6).

9 SPECIFICATION OF ERRORS

10 RELIED ON

11 1. The District Court failed to enforce California's
12 public policy against the illegal covenant restraining
13 competition in the License and Franchise Agreement.

14 2. The District Court mistakenly concluded that
15 Pennsylvania law governed the interpretation of the License
16 and Franchise Agreement.

17 3. The District Court improperly received the
18 speculation of a witness on the issue of irreparable injury
19 over the objections of appellants (R 176-177) and did
20 not permit appellants to cross examine on the subject.
21 (R 249-250).

22 4. The District Court improperly rejected evidence
23 offered by appellants tending to show that organized
24 franchisee disenchantment of long standing would be the
25 cause of the irreparable injury predicted to appellee's
26

1 franchise system (R 240-241).

2 5. The District Court disregarded established
3 principles of equity in granting the preliminary injunction.

4 6. The District Court erred in failing to make
5 findings on such relevant and material issues as appellee's
6 deceit and concealment at the time of execution of the
7 license agreement, the failure of consideration for the
8 obligations assumed by appellants therein, the wide dis-
9 semination of the Snelling method to persons outside its
10 organization, appellee's failure to police its trade
11 secrets, and other factors relevant to the issuance of the
12 preliminary injunction, although requested to do so by
13 appellants (Paragraphs 2 and 11 of Appellants' Motion to
14 Amend and Supplement Findings of Fact and Conclusions of
15 Law -(105, 113-114).

16 QUESTIONS PRESENTED

17 1. Whether a covenant against competition, contrary
18 to California public policy, contained in a license agree-
19 ment for operation of a franchise in California, should
20 be governed by Pennsylvania law as provided in the agree-
21 ment.

22 2. Whether, under California law, a system of training
23 and instruction in the operation of an employment agency
24 office can constitute a trade secret where the system is
25 widely known outside the franchise organization, utilizes
26 methods and techniques generally known in the industry,

1 and few efforts are made to maintain the secrecy of the
2 system.

3 3. Whether equity should intervene to enforce a
4 personal service contract which is one-sided in its terms,
5 at the request of the party thereto who first breached
6 it, where the essence of the conduct complained of has
7 been carried on for many months and the only proposed
8 variation offers no substantial threat of irreparable
9 injury.

10 ARGUMENT

11 I. The Restrictive Covenant in the License and
12 Franchise Agreement is Void and Unenforceable in
13 California and the Preliminary Injunction cannot stand
14 on that Basis.

15 A. The Court must apply existing California law.

16 It is settled law that in actions where
17 jurisdiction rests on diversity of citizenship the federal
18 courts look to the law of the state of the forum for the
19 applicable substantive principles of law, including its
20 choice of law rules (Erie R. R. v. Tompkins, 1938, 304
21 US 64, 58 S Ct 817, 82 L Ed 1188; Klaxon Co. v. Stentor
22 Elec. Mfg. Co., 1941, 313 US 487, 496, 61 S Ct. 1020, 85
23 L Ed. 1477).

24 This Court has recently expressed its
25 adherence to these principles (Cummings v. Bullock, 1966,
26 367 F2nd 182, 183; Curry v. Fred Olsen Line, 1966, 367

2 In Curry, Judge Duniway aptly posed and
3 provided the clear response to the plea made there, as it
4 was to the District Court in the instant case, that
5 the Federal Courts should seek to expand, modify, or extend
6 California law rather than apply it as they find it,
7 in these words:

8 "Appellant asks us to construe the law
9 of 1872 to meet the needs of 1965, to
10 apply a 'bold' approach to its con-
11 struction, to give the statute a gen-
12 erous construction to achieve results
13 consistent not only with the remedial
14 purpose of the statute but also with the
15 like purpose of the admiralty itself.
16 Whatever we may think our duty to be
17 when we are construing an act of Congress,
18 we think that where a California statute
19 is involved such exhortations are not
20 properly addressed to the Courts or to
21 the legislature of California. We do
22 not make California law, even inter-
23 stitiially; we have a more modest function,
24 to attempt to apply it as it is to a
25 particular case." (Emphasis added)

26 At the District Court, appellants urged upon the Court

1 the binding and controlling effect on the issues of a
2 1924 decision of this Court of Appeal (Davis v. Jointless
3 Fire Brick Co., 300 F 1). That decision squarely faced
4 and answered many of the legal issues presented to the
5 Court here, and answered them all with a resounding ne-
6 gative on points embraced by the District Court's decision
7 in this case. As set forth in its conclusion of law 3(b)
8 (134-137) the District Court was persuaded to turn its
9 back upon nearly a century-old strong and settled public
10 policy of California concerning the validity and enforce-
11 ability of contractual covenants restraining competition
12 in favor of the Court's supposition and speculation that
13 it saw a relaxation of this California policy in
14 California's adoption of the Uniform Commercial Code
15 (permitting parties to agreements to which the code applies
16 to agree they should be bound by the law of a stated
17 jurisdiction) and the decision of an intermediate appellate
18 court in California concerning the propriety of such an
19 agreement in an otherwise usurious contract (Ury v.
20 Jewelers Acceptance Corp. 1964 227 Cal App. 2nd 11;
21 California Commercial Code Section 1105). Since the
22 Commercial Code has absolutely no bearing whatever on
23 covenants in restraint of competition, and since Ury is
24 expressly grounded upon the lack of a strong California
25 policy against usury, the Court's use of these events as
26 foreshadowing a change in the public policy of California

1 on the subject of restrictive covenants is certainly
2 a concrete example of his succumbing to "exhortations
3 (as were) not properly addressed to (it)".

4 B. California has settled public policy against
5 covenants restraining competition.

6 This strong and settled public policy against
7 covenants in restraint of competition has been a part of
8 the California statutory law since the adoption of the
9 Civil Code in 1872. With negligible exception it has
10 remained unchanged to the present date. In 1941, after
11 codification of the California Business and Professions
12 Code, the provision was removed from the Civil Code where
13 it appeared as Section 1673, and installed as Section
14 16600 of the California Business and Professions Code.²
15 It reads in full as follows:

16 "Except as provided in this chapter,
17 every contract by which anyone is
18 restrained from engaging in a lawful
19 profession, trade, or business of any
20 kind is to that extent void."

21 The exceptions to the broad rule of Section
22 16600 are set forth in the ensuing two sections of the
23 Code dealing with agreements for the sale or transfer

24 * 2

25 Subsequent references to Section 16600-16602
26 shall refer to said Sections of California
Business and Professions Code.

1 of goodwill. These received amendment in 1945 (Stats
2 1945, C. 671), in 1961 (Stats 1961, Chapter 1091), and
3 in 1963 (Stats 1963, Chapter 597). The amendments in
4 the exception sections added the sale of corporate shares
5 or assets to the concept of the sale of good will in
6 Section 16601 and revised the language pertaining to
7 agreements between retiring and continuing partners set
8 forth in Section 16602. Had there been any desire or
9 intent whatever on the part of the legislature to relax
10 the California policy and extend the exceptions in any
11 areas other than the sale or transfer of good will, the
12 legislature had ample opportunity to consider such a
13 policy expression. No such change or relaxation has been
14 forthcoming from the legislature.

15 Where neither sale nor transfer of good will
16 is concerned, California's Supreme Court and District
17 Courts of Appeal have uniformly enforced the legislative
18 policy in the following factual frameworks:

19 1. A provision of a corporate pension plan
20 found in its standard employment contract purporting to
21 cause pension payments to be suspended or terminated in
22 the event a retired employee competed with any phase of
23 the business of his former employer was declared void
24 by California's Supreme Court as repugnant to its
25 settled public policy. (Muggill v. Reuben H. Donnelly
26 Corp., 1965, 62 Cal 2nd, 239, 243.) Chief Justice Traynor

1 spoke for the Court in these words:

2 "...the provision forfeiting plaintiff's
3 pension rights if he works for a com-
4 petitor restrains him from engaging in a
5 lawful business and is therefore void.
6 In view of the settled interpretation
7 of Section 16600, cases from other
8 jurisdictions cited by defendant are
9 not persuasive." (Emphasis supplied)

10 2. An agreement by the seller of stock in
11 a manufacturing corporation that he would pay the pur-
12 chasers liquidated damages in the event he competed with
13 the corporation in the states of California, Oregon or
14 Washington during a three year period following the sale,
15 was held void before Section 16601 was broadened to
16 except such transactions. (Chamberlain v. Augustine,
17 1916, 172 Cal 285, 287-288). A strict and unyielding
18 interpretation of the California policy was applied in
19 that case. The ultimate result was the amendment of
20 Section 16601 to provide an exception to the rule, not
21 theretofore appearing, where the sale of goodwill took
22 the form of a sale of corporate shares or assets.
23 Chamberlain was cited with approval in Muggill showing
24 nearly 40 years of consistent statutory construction.

25 3. An agreement among manufacturers re-
26 straining competition in the manufacture and marketing

1 of dynamite was declared void under the proscription of
2 Section 16600 (then Civil Code Section 1673) as early
3 as 1892 by California's Supreme Court which then regarded
4 the state's public policy on the question as being
5 legislatively declared and settled. (Vulcan Powder Co.
6 v. Hercules Powder Co., 1892, 96 Cal. 510, 513) and the
7 public policy is extended back 73 years from Muggill.

8 4. A licensing agreement restraining
9 competition for three years after termination of the
10 license was void under the mandate of Section 16600.
11 (Beatty Safeway Scaffold v. Skrable, 1960, 180 Cal App 2nd
12 650, 656).

13 5. An employment agreement between a
14 termite inspection and control company and its employee
15 prohibiting post-employment competition was void because
16 of conflict with Section 16600. (Fortna v. Martin, 1958,
17 158 Cal App 2nd 634).

18 6. A similar agreement with a janitorial
19 services contractor met the same fate. (Morris v. Harris,
20 1954, 127 Cal App 2nd 476).

21 California's policy against these
22 restrictive covenants has heretofore received the firm
23 support of this Court in at least three decisions
24 stretching over forty years of consistent construction.
25 Davis v. Jointless Fire Brick Co., 1924, 300 F. 1;
26 Zajicek v. Koolvent Metal Awning Corp. of America, 1960

1 283 F2nd 127, 131; Winston Research Corp. v. Minnesota
2 Mining & Mfg. Co., 1965, 350 F2nd 134, 140). These
3 decisions will be examined in greater detail in subsequent
4 portions of this argument.

5 C. California's public policy overrides the
6 contractual provision that it will be governed by
7 Pennsylvania law.

8 California follows the general rule that
9 it has the right to refuse to enforce an otherwise valid
10 contract where enforcement is so repugnant to its public
11 policy as to justify the refusal. (11 Cal Jur 2nd, 47-57,
12 135, Conflict of Laws Sections 8 and 54; Estate of Lathrop,
13 165 Cal 243, 247-248; Estate of Lund, 26 Cal 2nd 472,
14 477, 482-487; Thome v. Macken 58 Cal App 2nd 76, 78-81;
15 Biewend v. Biewend, 17 Cal 2nd 108, 113; Western Airlines
16 v. Sobieski, 191 Cal App 2nd 399, 406; 1 Witkin, Summary
17 of California Law 33); and that a contractual provision
18 that it shall be interpreted according to the law of
19 another jurisdiction must yield if enforcement in accord-
20 ance with the foreign law results in an evasion of its
21 settled public policy or a statutory enactment designed
22 for the protection of its citizens. (11 Cal Jur 2nd 138,
23 Conflict of Laws, Section 55 and cases cited).

24 Where the law making power speaks on a
25 subject over which it has constitutional power to legis-
26 late, public policy is what the statute enacts (Thome v.

1 Macken, Supra, p. 81)

2 Appellants find no California state
3 court appellate decision squarely on the point of whether
4 its public policy against covenants in restraint of com-
5 petition is sufficiently strong to justify it in ignoring
6 a contract proviso that the law of another jurisdiction
7 apply.

8 It can not be doubted, however, that
9 California has subscribed to this rule in other cases
10 and that its policy against restrictive covenants is
11 as strong and settled, of as long standing and as clearly
12 expressed by both the legislature and its courts as
13 could possibly be imagined.

14 This Court is not left to wander aim-
15 lessly without guiding precedent on this issue. It has,
16 at an earlier date, spoken authoritatively upon it (Davis
17 v. Jointless Fire Brick Co., 1924, 300 F. 1).

18 The question vital to the decision posed
19 by the Court in that decision was: "Does the statute
20 of California interdict the contract insofar as it
21 restrains Davis from selling a competing product?" The
22 Court reversed the District Court, and answered the
23 question in the affirmative, based upon the provisions of
24 California Civil Code 1673. The written agreement in
25 question was entered into between an Illinois corporation
26 engaged in the production and distribution of heat

1 resistive bricks and its exclusive sales agent in the
2 California area. After termination, the agent entered
3 into competition with his former principal who sued for
4 injunctive relief. There, as here, the circuit court
5 was faced with a provision in the written agreement that
6 the contract would be construed and interpreted according
7 to the laws of the State of Illinois which apparently
8 permitted such covenants against competition. The court
9 declared this provision in the contract ineffectual to
10 avoid the California statute, the place of performance,
11 the place where defendant resided, and the place where
12 the covenant against competition would be invalid by the
13 law therein prevailing. All of these factors apply equally
14 to the case at bar. The Court's rationale was that such
15 a contract is excepted from the rule of comity, holding
16 that no state is bound to recognize or enforce contracts
17 which the government of the state deem injurious to its
18 own interest, or to the welfare of its own people, or
19 which are in violation of its own laws. This is the
20 universal rule.

21 This rule and its application to forum
22 public policy against restrictive covenants has found
23 ready acceptance in other federal courts in this country
24 and has been used to resolve factual and legal contro-
25 versies nearly identical to the one before this Court.

26 For example, May v. Mulligan (1939 DC

1 Mich) 36 F Supp. 596, aff'd per curiam (CA6) 117 F 2nd
2 259, Cert. den. 312 US 691, 85 L Ed 1127, involved a
3 contract by which the defendant employee agreed not to
4 enter within two years after termination of his employ-
5 ment contract into the employ of anyone who might be
6 or was about to become a client of the plaintiff employer.
7 Both parties resided in Illinois at the time the contract
8 was entered into and the contract was made there. Pur-
9 suant to a Michigan statute declaring void contracts
10 containing such restrictive covenants against com-
11 petition the Court concluded the contracts could not be
12 enforced in a federal court sitting in Michigan. The
13 holding was that the public policy of Michigan declared
14 by its legislature was binding not only upon the state
15 courts of Michigan but also upon the federal courts
16 sitting therein, and that the Michigan statutes which
17 had been enacted in 1905 and antedated the contracts by
18 many years obviously were by implication included as
19 a provision of the contract.

20 For another, see Forney Ind. Inc. v.
21 Andre (DC ND 1965) 246 F Supp 334. There, the Federal
22 District Court noted that California and North Dakota sta-
23 tutes dealing with covenants against competing were identi-
24 cal and held, relying strongly on this Court's decision in
25 Davis, that the statutory prohibition was such that a
26 provision in an employment contract between a Colorado

1 corporation on the one hand and its district manager and
2 salesman in North Dakota on the other that Colorado law
3 would govern their contract would be ineffective and that
4 the restraints on competition were, based on the North
5 Dakota statute, violative of the expressed public policy
6 of the state and therefore were void and unenforceable.

7 The Davis decision of this Court has
8 received other recent endorsement in Oklahoma (E.S. Miller
9 Laboratories, Inc. v. Griffin)1948, 194 P. 2, 877 and
10 California (Muggill v. Reuben H. Donnelley Corp , 1965
11 62 Cal 2nd 239, 242, supra; Morris v. Harris, 1954, 127
12 Cal App 2nd 476). These cases did not involve the
13 interstate issues but the vitality of the state's public
14 policy against covenants restraining competition were
15 squarely at issue in each decision. Each approved the
16 persuasive reasoning in Davis.

17 For a collection of other state court
18 decisions involving similar covenants and similar public
19 policies, see the annotation in 3 ALR 2nd 522. The
20 judicial decisions everywhere recognize the living force
21 in this type of statutory enactment.

22 Notwithstanding this unbroken line of
23 authority, appellee persuaded the District Court that
24 Davis would be decided differently under present California
25 law. / ⁽¹³⁶⁻¹³⁷⁾ The contention has no foundation in logic or in
26 law or equity. As stated, the District Court rested its

1 conclusions on California's recent adoption of the
2 Uniform Commerical Code and an intermediate appellate
3 decision in Ury v. Jewelers Acceptance Corp., supra.
4 The latter case involved a claimed usurious contract.
5 The decision was specifically grounded upon the court's
6 finding that no strong public policy against the par-
7 ticular rate of interest in the contract involved in the
8 suit could be found (Page 21). With respect to usury,
9 the Court referred to a well established rule that a
10 provision in a contract for the payment of interest will
11 be held valid in most states if permitted by the law of
12 the place of contracting, the place of performance, or
13 any other place with which the contract has any substantial
14 connection (Page 20). On the question of public policy
15 in California on usury, the Court stated:

16 "That California does not have such a
17 strong public policy against any and
18 all contracts which would be usurious
19 if they were made and to be performed
20 here, appears from the fact that the
21 constitutional prohibition of usury,
22 Section 22, Article XX of the California
23 Constitution, enacted by initiative,
24 exempts from its provisions, banks,
25 building and loan association, industrial
26 loan companies, credit unions, licensed

1 pawn brokers and personal property
2 brokers, and several other kinds of
3 lenders, and gives the legislature
4 the right to prescribe maximum limits
5 for the exempted lenders. A strong
6 public policy, based on a settled
7 concept of justice or morality would
8 not be meshed with such alterable rates
9 as the legislature might choose to impose."
10 (Emphasis supplied)

11 The California Supreme Court denied a
12 petition for hearing in Ury on June 24, 1964. For appellee
13 to suggest that this evidences some relaxation of the
14 settled California public policy against covenants
15 restraining competition would be absurd. The Supreme
16 Court's decision in Muggill was rendered later, on January
17 19, 1965, wherein the highly pertinent Davis decision on
18 this aspect of California public policy was cited with
19 approval. Such citation by the California Supreme Court
20 in Muggill can only constitute an affirmance and a further
21 demonstration of its belief in California's continued
22 vibrant and forceful public policy against contractual
23 provisions which restrain competition and do not involve
24 the sale or transfer of goodwill.

25 As stated, appellants can find no trend
26 in the California decisional law and certainly there

1 has been no change in the express legislative policy of
2 the state, suggestive of a relaxation of California's
3 proscription against such covenants. California's policy
4 on this subject is firmly entrenched in its law and this
5 court has had no hesitancy in so finding heretofore in
6 Davis, Zajicek, and Winston, supra.

7 Appellants realize full well that their
8 legal position before this Court is not fully solved by
9 the determination that California's policy against
10 restrictive covenants remains as steadfast a bulwark as it
11 did in 1924 and as it has since 1872. A determination
12 of this point is necessary herein, however, in order to
13 logically proceed with a resolution of the balance of
14 the issues. If the restrictive covenant were legal and
15 valid in California, the question of the existence of
16 trade secrets would become moot. If as appellants contend,
17 on the other hand, the covenant is void and unenforceable,
18 this illegal provision can be severed, according to
19 Zajicek, Winston and Muggill, supra.

20 The issue then becomes one of whether
21 or not Snelling sustained its burden of proving that it
22 possessed trade secrets, disclosed them to appellants in
23 confidence, and that appellants were using or threatening
24 to use them in the operation of their San Bernardino
25 employment agency office.

26 // // //

1 II. Appellee Possessed No Trade Secrets

2 A. Trade secrets cannot be made such by private
3 agreement.

4 The District Court gave weight to appellee's
5 contention that appellants' stipulation in the license
6 agreement that they would treat the contents of the
7 training manuals as confidential and that the various
8 Snelling methods and techniques were of considerable
9 value as evidence tending to establish that this compilation
10 of information constituted a protectable trade
11 secret. (Finding of Fact 15 (R 126) and in its Conclusion
12 of Law 3(a) (R 133). The plain and simple answer to
13 this contention is found in the decisional law of
14 California:

15 "The essence of the protected interest
16 is the trade secret or trust. The
17 contract of the parties is not decisive
18 in establishing the interest; the
19 contract can not make a trade secret
20 out of a situation where none exists;
21 the interest itself as developed from
22 the accepted relationship of the parties
23 must be determinative."

24 State Farm Mutual v. Dempster, (1959) 174

25 CA2nd 418, 426 (Hearing denied by the Supreme Court)

26 State Farm dealt with the competing interests

1 of an insurance company and its agents and states that
2 the general considerations as to what constitute trade
3 secrets include these:

4 "Probably because of the strength of
5 these competing values the decisions
6 have turned not alone upon what the
7 parties have written in their con-
8 tracts but upon the nature of the
9 interests the parties seek to protect:
10 whether these are truly a kind of trade
11 secret or trust, a unique or special-
12 ized knowledge gained through the
13 confidential relation, a particular
14 'trade route' or general and fairly
15 easily obtainable information re-
16 lated to the sales of 'a product or
17 service, public acceptance of which
18 depends almost entirely on the price
19 or superiority of the product or
20 service being offered elsewhere on
21 the market.' (Hays, The California
22 Law of Unfair Competition Takes a
23 Turn - Against the Employer, 41 Cal.
24 L. Rev. 1953, Page 38 at 61: an
25 excellent analysis.)"

26 B. Matters of public knowledge cannot be trade

1 secrets.

2 In a reversal of an injunction issued in
3 favor of an employer and against a former employee
4 enforcing a covenant against competition, California's
5 Supreme Court held that matters of public knowledge or
6 of general knowledge in an industry can not be appropriated
7 by one as his secret. (Aetna Bldg. Maintenance Co. v.
8 West (1952) 39 Cal. 2nd 198, 206). Appellant successfully
9 argued to the Supreme Court in that case that there
10 are no trade secrets in the building maintenance busi-
11 ness and that no evidence had been presented to the trial
12 court relative to his use of a trade secret. The Court
13 noted:

14 "... Where, as here, superiority of
15 product or service rather than per-
16 sonal relationships or a secret
17 specialty, is the basis for patronage,
18 a knowledge of the customer's require-
19 ments is not sufficient reason for an
20 injunction." (Page 205)

21 Aetna involved some contacts and communications by the
22 employee with former customers of his employer after the
23 date of his termination which the Court felt fell short
24 of active solicitation. It is important to note, however,
25 that in the case here before this court there is no
26 "customer's list" to protect, there are no "peculiar likes

1 and fancies and other characteristics" of the former
2 employer's customers to be protected. It is superiority
3 of service only and efficient attention to the needs and
4 wants of both applicant and employer contacts that pro-
5 vides for success in the employment agency business.

6 C. Competing policy considerations

7 The problem of balancing the opposing
8 policy considerations between employer and employee,
9 principal and agent, licensor and licensee, and others
10 similarly situated, in the use and dissemination, after
11 the relationship is terminated of "business information"
12 developed before and during the relationship is one
13 that the Courts of California have grappled with in a
14 wide number and variety of factual situations.

15 Should the businessman have complete and
16 exclusive post-employment control over the information
17 he regards as vital to his success? What of the former
18 employee's right to labor for whom and in what fields
19 he chooses, to advance himself in the breadth and depth
20 of his intellectual and business pursuits, utilizing
21 the knowledge and skills derived from his past employ-
22 ment experiences? How does the public interest in fair
23 play, the promotion of morality and justice, and general
24 technological advancement affect the problem?

25 These and other determinations enter into
26 each adjudicated trade secret case, and each case turns

1 upon a careful evaluation of how its peculiar facts and
2 circumstances fit into the conflicting policy interests.

3 As earlier stated by this Court:

4 "On the one hand, restrictions upon
5 the use and disclosure of such infor-
6 mation limit the employee's employ-
7 ment opportunities, tie him to a
8 particular employer, and weaken his
9 bargaining power with that employer.
10 Such restrictions interfere with the
11 movement to the job in which he may
12 most effectively use his skills. They
13 inhibit an employee from either setting
14 up his own business or from adding his
15 strength to a competitor of his
16 employer, and thus they diminish potential
17 competition. Such restrictions impede
18 the dissemination of ideas and skills
19 throughout industry. The burdens
20 which they impose upon the employee and
21 society increase in proportion to the
22 significance of the employee's ac-
23 complishments, and the degree of his
24 specialization.

25
26 On the other hand, restrictions upon

1 an employee's disclosure of informa-
2 tion which was developed as a
3 result of the employer's initiative
4 and investment, and which was entrusted
5 to the employee in confidence, are
6 necessary to maintenance of decent
7 standards of morality in the business
8 community. Unless protection is
9 given against unauthorized disclosure
10 of confidential business information
11 by employees, employee-employer
12 relationships will be demoralized;
13 employers will be compelled to limit
14 communication among employees with a
15 consequent loss in efficiency; and
16 business, espionage, deceit, and fraud
17 among employers will be encouraged."

18 (Winston Research Corp v. Minnesota
19 Min. & Mfg. Co., 350 F2nd 134, 137-138)

20 Winston especially noted an earlier exposi-
21 tion of these competing interests found in Futurecraft
22 Corp v. Clary Corp., 205 Cal App 2nd 279, 286, quoting
23 with approval from Wexler v. Greenberg 399 Pa. 569, 160
24 A 2nd 430, 435):

25 "... a problem of accomodating
26 competing policies in our law:

1 the right of a businessman to be pro-
2 tected against unfair competitions
3 stemming from the usurpation of his
4 trade secrets and the right of an
5 individual to the unhampered pursuit
6 of the occupations and livelihoods for
7 which he is best suited. There are
8 cogent socio-economic arguments in
9 favor of either position. Society as
10 a whole greatly benefits from techno-
11 logical improvements. Without some
12 means of post-employment protection
13 to assure that valuable developments
14 or improvements are exclusively those
15 of the employer, the businessman
16 could not afford to subsidize re-
17 search or improve current methods.
18 In addition, it must be recognized
19 that modern economic growth and
20 development has pushed the business
21 venture beyond the size of the one-man
22 firm, forcing the businessman to a
23 much greater degree to entrust con-
24 fidential business information re-
25 lating to technological development
26 to appropriate employees. While

1 recognizing the utility in the
2 dispersion of responsibilities in
3 larger firms, the optimum amount of
4 'entrusting' will not occur unless
5 the risk of loss to the businessman
6 through a breach of trust can be held
7 to a minimum.

8
9 On the other hand, any form of post
10 employment restraint reduces the
11 economic mobility of employees and
12 limits their personal freedom to pursue
13 a preferred course of livelihood. The
14 employee's bargaining position is
15 weakened because he is potentially
16 shackled by the acquisition of alleged
17 trade secrets; and thus, paradoxically,
18 he is restrained, because of his in-
19 creased expertise, from advancing
20 further in the industry in which he
21 is most productive. Moreover, as
22 previously mentioned, society suffers
23 because competition is diminished by
24 slackening the dissemination of ideas,
25 processes and methods."

26 Winston, Futurecraft and Wexler, supra,

1 involved the highest degree of scientific and techno-
2 logical knowledge and skills: Winston in the art of
3 precision tape recorders; Futurecraft in valve design
4 development in the volatile United States rocket and
5 guided missile program; Wexler, the sanitations chemical
6 field.

7 As a review of the adjudicated cases in the
8 trade secret field will disclose, they generally fall
9 into either of two categories (1) those dealing with
10 such scientific and technological knowledge; or (2) those
11 dealing with customer information as exemplified by
12 the "retail delivery route" cases and the "customer list"
13 cases. Appellants have yet to find an instance where
14 the former employer has successfully invoked the equit-
15 able protection of the courts to preserve for himself
16 the exclusive right to use a compilation of general
17 business knowledge, however extensive it may be. Indeed,
18 even in the cases involving scientific data and knowledge
19 (Futurecraft and Wexler, for example) and in many of those
20 involving customer information (Davis, May, Forney,
21 Beatty, Fortna, Morris, supra, and others still to be
22 cited) the plea for protection by the employer, principal,
23 or licensor has been denied on appeal.

24 The competing policy considerations quoted,
25 supra, from Futurecraft and Winston also enter into the
26 customer information cases, lessened, however, by the

1 lack of public concern for the advancement of scientific
2 knowledge and data. Thus, the California courts have
3 uniformly recognized that:

4 "Equity will to the fullest extent
5 protect the property rights of
6 employers in their trade secrets and
7 otherwise, but public policy and
8 natural justice require that equity
9 should also be solicitous for the
10 right inherent in all people, not
11 fettered by negative covenants upon
12 their part to the contrary, to follow
13 any of the common occupations of life.
14 Every individual possesses as form of
15 property, the right to pursue any
16 calling, business or profession he
17 may choose. A former employee has the
18 right to engage in a competitive
19 business for himself and to enter into
20 competition with his former employer,
21 even for the business of those who had
22 formerly been the customers of his
23 former employer, provided such com-
24 petition is fairly and legally conducted."

25 (emphasis supplied)

26 (Continental Car-Na-Var Corp. v. Moseley,

This decision from California's Supreme Court determined an action brought by an Indiana corporation engaged in manufacturing compounds for finishing, cleaning, and treatment of floors and of tools and appliance for that purpose, for injunctive relief against its former District Manager in Los Angeles. The Supreme Court reversed the judgment granting the injunction despite the appearance of a property right in plaintiff in its list of customers upon the finding that the former employee was selling the manufacturer's products in an open competitive market and the list of customers could not be said to be a trade secret or to constitute confidential information.

In Mathews Paint Co. vs. Seaside Paint Co., 1957, 148 Cal App 2nd 168, in considering a paint company's request for injunctive relief against its former employees who had gone into business themselves in competition with their former employer, the Court expressed certain rules summarized from earlier cases, useful in detecting the trends in California law on protecting trade secrets:

- a. "Injunctive relief should be granted only upon convincing proof of a harmful violation of the plaintiff's rights, and the instances in which such rights are violated by an employee's misuse of information

1 gained during his employment con-
2 stitute an exceedingly small propor-
3 tion of the whole." (p. 174)

4 b. "In all of the California cases in
5 which the injunction has been granted
6 the customers were individuals being
7 ultimate consumers of commodities or
8 individual customers of laundry, bread,
9 ice or milk concerns, and the lists of
10 names and addresses were secret lists;...
11 It would be unusual for the people to
12 patronize more than one laundry man, ice
13 man, or milkman, allowing him to solicit
14 at their doors. If the list against
15 which the plaintiff seeks to enjoin, is
16 not confidential, the plaintiff can have
17 no proprietary interest therein. If
18 the defendants had possessed no knowledge
19 gained through their employment, would
20 not the exercise of just ordinary per-
21 spicacity have sent them to these very
22 places to solicit buyers? We think so."
23 (pp 173-174)

24 c. "The fundamental difference in the
25 decisions, as we read them, is whether
26 in a given case the knowledge gained by

1 an employee is secret and confidential.
2 If it is, its use by a former employee
3 will be enjoined. If it is not, its use
4 by a former employee will not be enjoined.
5 Some knowledge gained by an employee
6 is of such a general character that
7 equity will not restrict its later use."

8 (p 171)

9 Another case emphasizing the principle that
10 the former employee was engaging in a free and open com-
11 petitive market, the customers in which could rather
12 obviously be determined by just sitting down and thinking
13 about it, is Avocado Sales Co. v. Wyse, 122 Cal App
14 627, where the court denied injunctive relief to the
15 former employer where the business involved sales of
16 avocados to retailers such as grocery stores, vegetable
17 or fruit stands, clubs, hotels and cafes.

18 A distinguishing feature in the case here
19 before the Court, as compared to the employer-employee
20 customer list problems in that in those cases, the employee
21 was hired for the specific purpose of making sales to
22 such customers; in many cases the customers "belonged"
23 to the employer prior to the employee's hiring; in other
24 cases, the employee was hired specifically to build up
25 the customer lists to establish a market for the employer's
26 products or services. Here, appellants as franchisees

1 are building their own business. Appellee has only an
2 incidental interest in such reputation and business
3 contacts as the franchisees develop - that interest being
4 the 7 percent override.

5 We have no question whatever of appellants
6 seeking to take any advantage by use of customer informa-
7 tion of Snelling. Snelling had no customers in the
8 Riverside - San Bernardino area, and provided no customer
9 lists or customer information to appellants at any time.
10 The cases involving technical and scientific data pose
11 most difficult problems to the Court in evaluating the
12 public interest in the advancement of scientific and
13 technical knowledge and how this can best be achieved.
14 Again, this consideration is totally lacking in the present
15 case.

16 D. What trade secrets are

17 Perhaps an inordinate amount of space in
18 this brief has been devoted to the determination of what
19 is and what is not considered to be secret and confidential
20 information which can properly be protected as a trade
21 secret in the route list and scientific fields. These
22 have been examined because that is where the litigation
23 has occurred and the trends and principles to be applied
24 are therein pronounced.

25 Some time has also been spent in demonstrating
26 some things that trade secrets are not - i.e., matters of

1 general knowledge in an industry, matters of public know-
2 ledge, matters sought to be made so by agreement when they
3 are not, in truth and in fact, secret and confidential.

4 It is time to state what trade secrets are.
5 California has adopted the Restatement's definition.

6 (Restatement of Torts, Volume 4, Section 757, comment b;
7 Futurecraft Corp. v. Clary Corp., 205 Cal App 2nd 279,
8 289; Winston Research Corp v. Minnesota Min. & Mfg. Co.,
9 350 F 2nd 134, 139-140, Note 1). It reads in pertinent
10 part as quoted in Futurecraft:

11 "An exact definition of a trade secret
12 is not possible. Some factors to be
13 considered in determining whether given
14 information is one's trade secret are:
15 (1) the extent to which the informa-
16 tion is known outside of his business;
17 (2) the extent to which it is known
18 by employees and others involved in
19 his business; (3) the extent of mea-
20 sures taken by him to guard the secrecy
21 of the information; (4) the value of the
22 information to him and to his com-
23 petitors; (5) the amount of effort or
24 money expended by him in developing
25 the information; (6) the ease or dif-
26 ficulty with which the information could

1 be properly acquired or duplicated by
2 others."

3 Additional portions quoted in Winston are:

4 "A trade secret may consist of any
5 formula, pattern, device or compila-
6 tion of information which is used in
7 one's business, and which gives him
8 an opportunity to obtain an advantage
9 over competitors who do not know or
10 use it. ... It may be a device or
11 process which is clearly anticipated
12 in the prior act as one which is merely
13 a mechanical improvement that a good
14 mechanic can make."

15 Immediately, it is apparent we do not deal
16 here with any formula, pattern or device. Appellee's
17 claim is directed to a compilation of information which
18 it is alleged gives it and its franchisees an advantage
19 over their competitors. Let us apply the weighing factors
20 of the Restatement to appellee's compilation of information.

21 The evidence supports but one conclusion
22 in these important particulars:

23 (1) the information and training given to
24 appellants by appellee is widely known outside appellee's
25 business. McDonough and Still have testified that all
26 employment agencies in California use substantially the

1 same methods, procedure and policies and that there was
2 nothing new, novel or unique in the Snelling methods.
3 (R 75-76; R 31-33; R 149; Defendants' Exhibit B of October
4 31, 1967; R 148.) Appellee's witness, Wheeler, whose
5 entire direct examination appears at R 84-90, R 93-99, and
6 R 122-124, said nothing to counter this testimony and no
7 other evidence was produced by appellee on the subject.
8 Wheeler speaks only of the "total concept" of and the
9 appellee's "we place people" "philosophy" as being different
10 (R 95/10-96/17). But, when asked whether any other agencies
11 did the same thing, he said: "I don't know about all
12 agencies. I would say the agency owners that I have met
13 or talked with do not practice their business as we do ...
14 because they have many other complaints about business,
15 and we are doing great." (R 96/24-97/3) That is the total
16 substance of appellee's evidence on the question of whether
17 its compilation of information is known outside its
18 organization.

19 A cursory comparison of appellee's
20 manuals (Plaintiff's Exhibit 1) with others produced by
21 appellants (Defendants Exhibit B) reveals the similarity of
22 the content. Appellee has no secrets.

23 Appellee could not and did not counter
24 appellants' additional evidence that hundreds and thousands
25 of former national supervisors of appellee, former fran-
26 chisees of appellee, and former counselors of the

1 franchisees, were no longer operating within the Snelling
2 system and were competing with it. (R 33-35; 51-52; 104-
3 105; 205-221)

4 (2) The information is of necessity
5 widely known by all employees of appellee, by the fran-
6 chisees and the employees of the franchisees, no effort
7 being made to restrict distribution of the alleged secret
8 information to only a higher level of officers, directors
9 or key employees of appellee. Appellants request for
10 findings on this vital consideration on the issue of
11 whether appellee's compilation of information could pro-
12 perly be classified as a trade secret (113), was ignored
13 by the District Court.

14 (3) Appellee produced no evidence that it
15 had taken effective measures to guard the secrecy of the
16 information. It has sought to prevent but six former
17 employees or franchisees from utilizing their trade secrets
18 until the present suit. (R 221-223)

19 (4) While its franchise-selling techniques
20 have produced large sums of money for appellee (R 178),
21 it has not shown that this is due to its compilation of
22 information. It may as well have resulted from the in-
23 creasing mobility and job-shifting of the American worker.
24 Had the information the value impliedly ascribed to it
25 by appellee, what would account for the vast percentage
26 of failures and turnovers among the franchisees in its

1 system (R 210-226)?

2 (5) Appellee has failed to show any
3 expenditure of effort or money in developing any secret
4 information. It has shown the composition of some
5 training courses and the hiring of three or four national
6 supervisors to assist some 500 franchises sold. A
7 modest concession to the service from headquarters the
8 franchisees needed, as shown by their development of
9 their own organization, The Franchise Owners Association
10 (R 238-239; 242-243).

11 (6) It can not be said that the informa-
12 tion possessed by appellee, whatever it is, can not be
13 acquired or duplicated by others with great ease. Literally
14 hundreds of employment agencies operate throughout the
15 United States. Some are more successful than others, some
16 have franchised some have not. Many have prepared and
17 published manuals which answer the bulk of the questions
18 that the franchisee or operator of the active agency
19 requires in meeting his routine needs in operating his
20 business, (which are available on the open market (R 150/
21 7-10). Appellee has totally failed to show that he has
22 any specific information which could not be readily ac-
23 quired or duplicated, or has not already been acquired or
24 duplicated, by others in the field. Here it is well to
25 return to the provisions of the license agreement and
26 examine those specific aspects of the employment agency

1 business in which Snelling proposed to provide expertise
2 to appellants. (Paragraph 2(a) of License and Franchise
3 Agreement; 20) (1) interviewing of clients (2) evaluation
4 of clients (3) preparation of job orders (4) telephone
5 usage (5) preparation of advertising (6) record keeping
6 (7) usage of forms (8) selection of office location (9)
7 office layout and furnishing (10) selection of office
8 personnel and (11) office operations.

9 To examine the subject matter designations
10 is to answer the question - not a subject is mentioned
11 but that any person setting out to perform the described
12 function would arrive essentially at the same method of
13 procedure. Not a single possibility of secretly acquired
14 information, manufacturing processes, equipment, form or
15 style of product is involved in any and all of the subject
16 matter in which Snelling is to provide instruction and
17 training.

18 In essence, appellee is claiming: "we gave
19 you good and complete training; we have provided you with
20 guidance so you can efficiently operate your business;
21 our guidance and training have been full and complete so
22 you have been able to be successful at your business;
23 therefore, these are trade secrets, therefore protectable,
24 and therefore you can not compete with us upon termina-
25 tion of the franchise agreement." There has been a complete
26 lack of any showing of anything unique, secret, novel,

1 or a special or peculiar value in the methods, procedures,
2 or techniques of appellee. The evidence is all one way
3 and is to the effect that all of said methods, procedures,
4 and techniques were matters of public knowledge, were
5 widely used in the industry by all other efficient and
6 successful employment agencies. Indeed, it is difficult
7 to imagine even one trade secret which could be found
8 to be involved in the operation of an employment agency
9 The business involves solution of a rather simple problem
10 of finding jobs for applicants who are brought to the
11 agency's doors by advertising or reputation, and finding
12 of employment opportunities by reputation and business
13 contacts, by past service well performed. There is no
14 product to sell, merely service. It is not unlike being
15 an attorney or a consulting engineer. Manifestly, the
16 more talent and the more training and knowledge you have,
17 the more likely you are to be successful. But to say
18 that there are secrets by which one can prosper and
19 another, without possession thereof, will fail, is
20 patently absurd.

21 Despite this, had Snelling shown by the
22 evidence even one practice, procedure, bit of information,
23 novel or unique idea or concept, and had identified it in
24 the record in this case, appellants would agree that the
25 District Court and this Court would be perfectly justified
26 in requiring appellants to cease and desist from use of

1 that valuable gem. Instead, Snelling has contented itself
2 with stating that its complete program, the thoroughness
3 of its training, the extensiveness of its manuals, and
4 the interaction of its franchisees, somehow provides a
5 total concept that has acquired a confidential and secret
6 hue not supplied by any of its individual ingredients.
7 One might as well say that the University of Southern
8 California or West Coast Trade School possessed pro-
9 tectable trade secrets in that portion of the world's
10 knowledge they employed in their curriculum sufficient to
11 prevent its teachers and students from leaving and using
12 that knowledge in their subsequent pursuits.

13 To recognize that a California State Employ-
14 ment Agency exists and publishes a manual comparable in
15 content, if not in length, repetition, instruction in
16 immoral and dishonest practices, as the Snelling manual,
17 is to realize that the training and information necessary
18 to operate an employment agency business is essentially if
19 not totally a matter of public knowledge or of general
20 knowledge in the employment industry.

21 Testimony of Chadwick as to how he got his
22 start, where he got his information, how he acquired his
23 manuals, and how he operates, (R 154-160) are eloquent
24 proof that Snelling has no compilation of information
25 available in its system which can not be readily acquired
26 from other sources by anyone interested in entering the

1 employment agency business.

2 III. Equitable Principles Dictating Denial of Injunctive
3 Relief

4 A. He Who seeks Equity Must Do Equity

5 Appellants recognize that inclusion of the
6 illegal covenant against competition in the license agree-
7 ment is not sufficient, standing alone, to bar injunctive
8 relief to appellee herein, and that this Court has so
9 decided in Zajicek and Winston, supra. When coupled with
10 other evidence of appellee's fraud and deceit the un-
11 conscionable character of its license agreement and the
12 partial failure of consideration for appellants' obliga-
13 tions thereunder, the District Court's conclusion that
14 appellee was deserving of the protection of equity was
15 clearly erroneous.

16 The fraud and deceit referred to consist of
17 appellee's knowledge that its name could not be used in
18 licensing and advertising activities of its franchisees
19 in California and its failure to furnish such information
20 to appellants when it had a clear duty to speak. (R 31,
21 37-38; 258-260). Relation will hereafter be made to the
22 repeated references to the value of appellee's name in
23 the license agreement.

24 California law provides that with certain
25 named exceptions, not pertinent here, an injunction can
26 not be granted to prevent the breach of a contract the

performance of which would not be specifically enforced.
(California Civil Code Section 3423 (5)) and that an
obligation that provides for personal service or requires
the employment of another inpersonal service can not be
specifically enforced. (California Civil Code Section 3390
(1)(2)).

Of significance in this context is the provision in the license agreement (paragraph 14 (a)) that the agreement constitutes a "personal service contract" which is entered into "in reliance upon and in consideration of the personal qualifications, and representations with respect thereto, of licensee."

There is another well-accepted rule of equity that equity will not enforce an unconscionable contract and that specific and injunctive relief will be denied on that ground alone. (Campbell Soup Co. v. Wentz, 1948, 172 F 2nd 80 (CA3); 4 Pomeroy, Eq. Jurisprudence, Section 1405 a (5th Edition, 1941); 5 Williston, Contracts Section 1425 (Rev. ed. 1937). In Campbell, Court of Appeals for the Third Circuit considered the propriety of injunctive relief in the case of an agreement between the parties for the production of carrots, and stated:

"We think it is too hard a bargain and too one-sided an agreement to entitle plaintiff to relief in a Court of conscience. The agreement is on a

1 printed form obviously drawn by
2 skillful draftsmen with the buyers'
3 interests in mind."

4 A comparable result was achieved by the
5 District of Columbia Court of Appeals in Williams v.
6 Walker - Thomas Furn. Co. (1965) 350 F 2nd 445 where the
7 Court, citing the Campbell Soup case with approval,
8 declined to enforce what it regarded as unconscionable
9 contracts for the purchase of home furnishings and
10 appliances.

11 So, here, this Court will have no difficulty
12 in recognizing that the license and franchise agreement
13 between the parties was "obviously drawn by skillful
14 draftsmen with the (licensor's) interests in mind."
15 (See the License and Franchise Agreement at 20-25)

16 a. The second recital provides that licensee
17 desires to obtain a license to use the Snelling name.
18 Appellee's knowledge of the licensing and advertising
19 restrictions placed upon the use of its name in California
20 by the State Labor Law Commissioner, and its failure to
21 communicate this information to appellants should be
22 grounds enough to deny them relief in these proceedings.
23 The contractual provision in question shows that the use
24 of the name was a substantial and material consideration
25 for appellants' entry into the contract.

26 b. In paragraph 1(a), Snelling grants to

1 appellants the right to use the registered trade name
2 "Snelling & Snelling", well knowing they were in no position
3 to deliver any such right in the State of California.
4 To see the importance attached to the use of the name by
5 the parties, one need only refer to paragraph 1(c), pro-
6 viding that appellants could use only the name "Snelling
7 & Snelling" in the operation of their business. Consider,
8 also, that Snelling's president contended in a sworn
9 affidavit given in another pending case in California, that
10 "the revenue which the corporation receives from its
11 franchisees is solely in compensation for the use of the
12 'Snelling' name and for the instruction in the unique
13 Snelling method of operating a personnel consulting and
14 employment agency office" (R 138/10-16)

15 c. Paragraph 1(d) obviously contemplates
16 the forfeiture by appellants of the entire \$8,400.00
17 franchise fee if they were unable to get their office open
18 and commence operation of their business in Riverside,
19 California, within 90 days from the date of the agree-
20 ment - an expensive course of training considering that
21 appellants McDonough could have purchased a four year
22 college course, for one of themselves at least, complete
23 with board and room for such a figure.

24 d. Paragraph 2(a) provides that appellee's
25 instruction, advice and guidance to appellants and their
26 employees would be furnished only as Snelling's judgment

1 dictated at a place and time to be designated by it.

2 The contract requires in the same paragraph that appellants
3 treat the contents of Snelling's manuals as confidential
4 whether or not there is, in fact, anything novel, unique,
5 or secret therein.

6 e. Paragraph 2(b) says further instruction
7 or advice desired by the licensee was to be provided at
8 their own expense, payable in advance at Snelling's
9 request.

10 f. In order to assist Snelling in maintaining
11 an appropriate (to its purposes) check on the business
12 being done by its licensees, paragraphs 4(c) through
13 4(h) require submission of an impressive body of reporting
14 forms to Snelling. Doubtless the preparation of these
15 forms and Snelling's right to require the licensee to
16 provide copies of their social security reports, state
17 and federal unemployment reports, federal income tax
18 returns, state income, franchise or other tax returns,
19 and such other federal, state, county or city reports as
20 may reasonably be necessary to ascertain the status of
21 licensee's business, and the copy of the annual certified
22 audit, were designed to permit Snelling to readily deter-
23 mine whether the licensee was remitting the proper override.

24 g. Not content with the payment of \$8,400.00
25 and 7 percent of the gross receipts of the licensee's
26 business forever after, for a two week training course,

1 the contract then provides for minimum gross receipts
2 which provide an absolute minimum below which the over-
3 ride can not fall for the life of the franchise agree-
4 ment. Any failure on the licensee's part to produce
5 7 percent of the minimum figures provided in theis para-
6 graph 5(a) constitutes a default.

7 h. Paragraph 6(c) requires telephone
8 directory advertising onforms prescribed or approved by
9 Snelling again indicating the solemn agreement and con-
10 templation of the parties that licensees would have the
11 right to use the Snelling & Snelling name.

12 i. Paragraph 8(b) includes the covenant
13 against competition made illegal in California by Business
14 and Professions Code Section 16600 and includes the
15 Snelling-serving concession that the licensee acknowledges
16 that the name, the reputation, the methods and techniques,
17 the training and instruction, etc. etc., furnished the
18 licensees by Snelling are of "considerable value".

19 j. Paragraph 8(c) requires similar
20 covenants against competition from each of the licensee's
21 employees and imposes on licensees the duty of fully and
22 effectively enforcing the terms of the agreement at their
23 own expense, and in the event of their failure, permits
24 Snelling to do so at licensees' expense.

25 k. Paragraph 11 contains the massive
26 powers of Snelling in the event of termination requiring,

to
1 in effect, the licensees/turn over every asset, record
2 and even the telephone in its office, to Snelling.

3 1. Paragraph 11(h) even includes an
4 advance declaration by licensees that they realize any
5 breach of the covenant against competition will cause
6 substantial and irreparable harm to Snelling and sets
7 forth the McDonoughs' consent to the issuance of an in-
8 junction putting them out of business. The provision
9 also covers a modest liquidated damages provision of 50
10 percent of licensees' gross annual receipts for a three
11 year period.

12 m. Paragraph 12 requires the licensees
13 to waive the right to trial of any action initiated
14 against them by Snelling and to waive all of their home-
15 stead and exemption rights. A better example of over-
16 reaching, contrary to every concept of fair play and
17 due process in every jurisdiction in the United States of
18 America, is difficult to conceive.

19 n. Under paragraph 14, licensees have no
20 right to sell assign or sublicense their franchise
21 without Snelling's written consent and on Snelling's terms.

22 o. Finally, paragraph 14(c) of the
23 agreement provides that, even in death, the rights of
24 licensees, their heirs and personal representatives are
25 minimal, being permitted only 60 days from the date of
26 death within which to locate a purchaser who will pay

1 Snelling \$3,000.00 for undefined "expenses " and hope-
2 fully, something to the personal representative covering
3 the value of the business assets and goodwill.

4 p. The only concession of any sort that
5 it can be said appellants were able to obtain in the neg-
6 otiation of the agreement was the right to convert to a
7 corporate form, without the payment of fees or expenses
8 to Snelling, provided the corporation was organized and
9 the request made within 6 months of the date of the agree-
10 ment. (paragraph 20)

11 In sum total, the Campbell Soup contract was
12 a model of corporate restraint and generosity in com-
13 parison to the unbelievably burdensome provisions in the
14 agreement here before the court.

15 B. Appellee Failed to Show a Meaningful Threat
16 of Irreparable Injury

17 Appellants' Specification of Error No. 3 and
18 No. 4 relate to the admission of evidence on this subject.

19 It was incumbent on appellee to show that
20 irreparable injury would result if the injunction were
21 denied and that damage to it if the injunction were denied
22 plainly outweighed any foreseeable harm to appellants
23 Ross-Whitney Corp. vs. Smith, Kline & French Labs., CA
24 9 1953, 207 F 2nd 190).

25 The evidence was that long-standing dissension
26 existed between appellee and a group of fifty of its

1 franchisees which pre-dated the relationship of appellee
2 and the McDonoughs (R 252-253). Inquiry into the nature
3 and extent of this dissension was barred by the District
4 Court, although plainly offered to show that the injury
5 forecast by appellee's witness would come from this sector
6 and that conduct of the McDonough's would have no causal
7 relationship thereto. (R 240-243)

8 The District Court's ruling on this offered
9 testimony came during hearing of appellants' motions for
10 supersedeas and to stay the preliminary injunction pending
11 appeal. It must be borne in mind, however that McBrearty
12 did not appear as a witness until the hearing of these
13 motions and that, until he appeared, the record was com-
14 pletely devoid of any evidence to show an imminent threat
15 of harm to appellee. If McBrearty's testimony concerning
16 the threat of harm was admissible at all (and it was
17 received over appellants' objection - R 176-177), the
18 District Court erred in restricting appellants' in cross
19 examining McBrearty on the basis for his opinion (R 249-
20 250), and their efforts to show other causes for the
21 threatened disintegration of the franchise system (R
22 240-243).

23 Another factor which was clearly of signifi-
24 cance in balancing the equities in deciding whether or
25 not injunctive relief should be granted, was disregarded
26 by the District Court.

1 Considering the extent of appellants'
2 business activities in San Bernardino trade area from
3 their Riverside office (47-48; 53; R 27-30) all of which
4 preceded by many months appellee's application for
5 injunctive relief pendente lite, the status quo between
6 the parties would have been better maintained by per-
7 mitting the continuation of the San Bernardino office.
8 Appellants proved, without contradictory evidence being
9 received or offered, that their activities in the San
10 Bernardino area were undertaken with the advice and consent
11 of appellee (R 30), that one-half their advertising was
12 expended there and one-half their business came from
13 that area (R 28-30).

14 On equitable principles alone, the Court of
15 Appeals for the Tenth Circuit denied injunctive relief in
16 a comparable dispute between a franchisor and one of its
17 franchisees in Goldammer v. Fay (1964) 326 F 2nd 268.
18 There plaintiff was the owner of certain rights involved
19 in the Dairy Queen franchise which, in exchange for fixed
20 payments from the defendant franchisee permitted him the
21 use of the franchise name, sign, ice cream formulae mix,
22 etc. The franchise was terminated by the plaintiff for
23 defendant's failure to make the payments and plaintiff
24 sought to enforce the two year covenant against competition
25 in the franchise agreement when defendant remained in
26 business at the same location in Colorado Springs,

1 Colorado, but changed his sign and the name of his
2 business. Although such restrictive covenants against
3 competition are valid in Colorado (as seen in the Forney
4 case, supra,) both the trial court and appellate court
5 denied plaintiff the injunctive relief sought on the
6 premise that no evidence of irreparable injury had been
7 shown, the Court relying on the rule that injunctive
8 relief is a drastic remedy to be exercised with caution and
9 should be granted only in cases where the necessity there-
10 fore is clearly established (Citing Colorado authority for
11 that proposition).

12 CONCLUSION

13 To summarize briefly, appellants McDonough contend
14 the District Court failed to properly interpret and apply
15 California's settled public policy against covenants in re-
16 straint of competition, erroneously concluded, under tests
17 prescribed by California judicial decisions, that appellee
18 had carried its burden of proving its training, manuals,
19 and methods were in fact trade secrets, and ignored
20 established principles of equity in giving appellee in-
21 junctive relief herein.

22 Appellants respectfully urge this Court to reverse
23 the Order Granting the Preliminary Injunction and to dis-
24 solve the Preliminary Injunction itself.

25 HENNIGAN & BUTTERWICK

26 By 
Attorneys for

Appellants

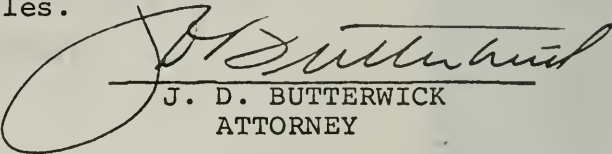
APPENDIX

TABLE OF EXHIBITS

<u>Exhibit</u>	<u>Reporter's Transcript Page</u>
Plaintiff's Exhibit 1 (Appellee's training manuals)	11
Plaintiff's Exhibit 2 (Appellants' 1965 receipts)	22
Defendants' Exhibit A of September 28, 1967 (Advertising samples)	62
Defendants' Exhibit A of October 31, 1967 (Appellants' sales summary)	146
Defendants' Exhibit B (other training manuals)	150
Defendants' Exhibit C (TV Guide)	266
Defendants' Exhibit Z (Appellee's fact sheet)	203
Defendants' Exhibit 4 (Appellee's Signpost)	242

CERTIFICATE

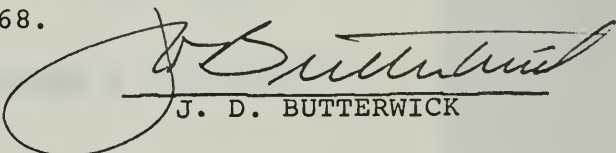
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


J. D. BUTTERWICK
ATTORNEY

CERTIFICATE OF SERVICE BY MAIL

I, J. D. BUTTERWICK, certify that I am the attorney for appellants in this action, and that I served three copies of the above Appellants Brief by mail on the attorney for appellee.

Dated: May 20, 1968.


J. D. BUTTERWICK

